

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO, CA**

**STERN PRODUCE COMPANY, INC.**

**and**

**Cases 28-CA-282577  
28-CA-285540**

**UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 99**

*Nestor Zarate Mancilla, Esq.*, for the General Counsel.

*Patrick R. Scully, Esq., and James S. Korte, Esq., (Sherman and Howard LLC)*, for the Respondent.

*Martin Hernandez, Esq.*, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

**DICKIE MONTEMAYOR, Administrative Law Judge.** This case was tried before me on March 1–2, 2022, via the Zoom for Government videoconferencing platform. Charging Party filed a charge on September 8, 2021, an amended charge on October 6, 2021, and another separate charge on November 2, 2021, and an amended charge on February 3, 2022, alleging that Uvaldo Ponce was issued a written warning and that employees were instructed to uncover cameras in the cabs of their trucks thus allegedly creating an impression among employees that their union and protected concerted activities were under surveillance in violation of Section 8(a)(1), (3) and (4) of the of the National Labor Relations Act (the Act). The cases were combined, and a consolidated complaint was issued. Respondent filed an Answer denying that it violated the Act. The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs which were received on April 5, 2022. I carefully observed the demeanor of the witnesses as they testified, and I rely on those observations in making credibility determinations. I have studied the whole record, the posttrial briefs, and the authorities cited. Based on the detailed findings and analysis below, I conclude and find the Respondent did not violate the Act as alleged in the complaint.<sup>1</sup>

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<sup>1</sup> Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

## FINDINGS OF FACT

### I. JURISDICTION

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The complaint alleges, and I find that

1. (a) The charge in Case 28-CA-282577 was filed by the Union on September 8, 2021, and a copy was served on Respondent by U.S. mail on the same day.

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(b) The first amended charge in Case 28-CA-282577 was filed by the Union on October 6, 2021, and a copy was served on Respondent by U.S. mail on the same day.

2. (a) At all material times, Respondent has been a corporation with an office and place of business in Phoenix, Arizona (Respondent's facility), and has been engaged in the wholesale distribution of food products.

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(b) During the 12-month period ending September 8, 2021, Respondent, in conducting its operations described above in paragraph 2(a), purchased and received at Respondent's facility goods valued in excess of \$50,000 directly from points outside the State of Arizona.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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3. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

4. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act, and agents of Respondent within the meaning of Section 2(13) of the

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Act:

William Stern	----	President
Linda Sili	----	Night Supervisor
Patricia Helms	----	Controller/Acting HR Representative
Nick Barr	----	Transportation Manager

## II. ALLEGED UNFAIR LABOR PRACTICES

Uvaldo Ponce was employed at Stern Produce as a driver delivering produce shipments to various food service facilities since May 1, 2020. He was employed pursuant to the terms of a Formal Settlement Stipulation in Case 28-CA-258619. When he was reemployed, he was provided a copy of Respondent's employee handbook. Among the terms outlined in the handbook. (R. Exh. 1.) The handbook outlining the policies and procedures of the employer included specific provision prohibiting harassment or discrimination including the following:

STERN PRODUCE CO INC. is committed to the principles of equal employment. We are committed to complying with all federal, state, and local laws providing equal employment opportunities, and all other employment laws and regulations. It is our intent to maintain a work environment that is free of unlawful harassment, discrimination, or retaliation because of . . . race, color, national origin, ancestry . . . sexual orientation (including transgender status, gender identity or expression) . . . or any other status protected by federal, state, or local laws. . . . The Company will conduct an investigation of all plausible allegations of discrimination, harassment, or retaliation, or any violation of the Equal Employment Opportunity Policy in a confidential manner. The Company will take appropriate corrective action, if and where warranted. The Company prohibits retaliation against employees who provide information about, complain about, or assist in the investigation of any complaint of discrimination or violation of the Equal Employment Opportunity Policy. We are all responsible for upholding this policy. You may discuss questions regarding equal employment opportunity with your immediate supervisor/manager or any other designated member of management.

### *Policy Against Workplace Harassment*

STERN PRODUCE CO INC. has a strict policy against all types of unlawful workplace harassment, including sexual harassment and other forms of workplace harassment based upon an individual's . . . race, color, national origin, ancestry, . . . sexual orientation (including transgender status, gender identity or expression), . . . or any other status protected by federal, state, or local laws. All forms of harassment of, or by, employees, vendors, visitors, customers, and clients are strictly prohibited and will not be tolerated.

. . .

### *Other Harassment*

Other workplace harassment is verbal or physical conduct that insults or shows hostility or aversion toward an individual because of the individual's . . . race, color, national origin, ancestry, . . . sexual orientation (including transgender status, gender identity or expression) . . . or any other status protected by federal, state, or local laws.

Again, while it is not possible to list all the circumstances that may constitute other forms of workplace harassment, the following are some examples of conduct that may constitute workplace harassment:

- The use of disparaging or abusive words or phrases, slurs, negative stereotyping, or threatening, intimidating, or hostile acts that relate to the above protected categories;
- Written or graphic material that insults, stereotypes, or shows aversion or hostility toward an individual or group because of one of the above protected categories and that is placed on walls, bulletin boards, email, voicemail, or elsewhere on our premises, or circulated in the workplace; and
- A display of symbols, slogans, or items that are associated with hate or intolerance toward any select group.

*Reporting Discrimination and Harassment*

. . . Discipline for violation of this policy may include, but is not limited to, reprimand, suspension, demotion, transfer, and discharge. If the Company determines that harassment or discrimination occurred, corrective action will be taken to effectively end the harassment. As necessary, the Company may monitor any incident of harassment or discrimination to assure the inappropriate behavior has stopped. In all cases, the Company will follow up as necessary to ensure that no individual is retaliated against for making a complaint or cooperating with an investigation.

(See R. Exh. 1 at 45–47.)

Ponce currently holds the position of committee leader with United Food and Commercial Workers Union Local 99. The position is strictly a volunteer position for which he receives no pay. His duties as a committee leader include attending union meetings and speaking with other workers by telephone or in person. He has been working to establish the Union at Respondent's facility for a period of 6 years.

In early August of 2021, Ponce while filling out invoices noticed two other employees who were joking around with each other, Mohamad Chaykho and Joe Metzger. During the exchange between the two Metzger greeted Chaykho stating, "hey baby" and blew him a kiss. (See R. Exh. 5–7.) Chaykho responded by saying, "hey baby." Upon hearing this Ponce said to Chaykho, "you know they kill people like that in your country." *Id.* Chaykho responded, "like that, what is that supposed to mean?" *Id.* Ponce replied, "gays." *Id.* What country is that responded Chaykho? *Id.* To which Ponce replied, "Afghanistan." *Id.* Chaykho then asked, "is that where I am from?" *Id.* Ponce then clarified saying, "no no, I mean from where Saddam Hussein is from." *Id.* Chaykho then asked if Ponce was referring to Iraq to which Ponce responded "yes" and Chaykho advised him he was not from Iraq. *Id.* Ponce asked, "where are you from then." *Id.* To which Chaykho responded, "don't worry about it" and left the office. *Id.*

The next day an employee who overheard the exchange reported it to Nick Barr, the transportation manager, who then spoke with Bill Stern, the president of the Company. Both decided that an investigation was warranted so Barr requested that each of the witnesses provide written statements to get, "everybody's perspective of what happened. (R. Exh. 5–7, Tr. 281–282). After the statements were provided, Patricia

Helms, the human resources representative, Nick Barr and William Stern met to discuss if any discipline was warranted and if so the appropriate discipline to be meted out. The group decided that since the statements implicated race, ethnicity, and sexual orientation Ponce's statements violated the Company's EEO policies. Thus it was determined that a written warning was appropriate. (Tr. 293–293). On August 31, 2021, the Company issued to Ponce a written warning that contained the following language:

This corrective action form is to confirm our discussion today during which you were advised that your recent words and comments about Mohammad and his country. It was stated that you used the words "They Kill people like (sic) in your country". It was asked what is that supposed to mean and it was implied "gays". It was also stated by wittiness that asked Mohammad to tell you what country he was from making Mohammad feel very uncomfortable around answering the question.

Our company policy around the use of disparaging or abusive words, phrases, slurs, and negative stereotyping is very clear and outlined in our employee handbook and will not be tolerated.

It is expected that you will immediately address this situation and that further discussions will not be required. However, if there is a need to again have discussion arising from lack of corrective action being taken by you, the company reserves the right to impose further disciplinary action, up to and including suspension and termination of employment. (R. Exh. 7.)

## Analysis

### 1. The letter of warning

Section 7 of the Act in pertinent part states: "Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection."

Section 8(a)(4) of the Act is essentially an anti-retaliation provision that forbids an employer from discharging or otherwise discriminating against an employee because he or she has filed charges or given testimony under the Act. In *NLRB v. Scrivener d/b/a AA Electric Co.*, 405 U.S. 117 (1972), the court held that Section 8(a)(4) specifically applied to other activities including providing affidavits, appearing but not testifying, and being subpoenaed at a Board hearing.

Section 8(a)(3) makes unlawful discrimination in regard to hire, tenure of employment or any other term and condition of employment to encourage or discourage membership in any labor organization. Where motivation is in issue the Board looks to the test set forth in *Wright Line*, 251 NLRB 1083 (1080), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to determine if a violation has occurred.

The General Counsel must initially show that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 6, 8 (2019); see also *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 1–2 (2020). Evidence is probative of unlawful motivation only if it adds support to a reasonable inference that the employee’s Section 7 activity was a motivating factor in the employer’s decision to impose discipline. *General Motors LLC*, 369 NLRB No. 127 (2020).

If the General Counsel makes his/her initial case, the employer will be found to have violated the Act unless it meets its defense burden to prove that it would have taken the same action even in the absence of the Section 7 activity. See *Hobson Bearing International*, 365 NLRB No. 73, slip op. at 1 fn. 1 (2017). If the evidence as a whole “establishes that the reasons given for the [employer’s] action are pretextual—that is, either false or not in fact relied upon—the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.” *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

After considering the totality of the evidence, I concur with Respondent that the evidence failed to establish elements essential to the General Counsel’s claim. The evidence confirmed at most that Charging Party engaged in protected activity some 5 years prior and was at the time of his discipline a union committee leader.<sup>23</sup> However, there is no evidence to establish that the employer was aware of his union activity that was taking place at the time of the discipline. Assuming for the sake of argument that Respondent was aware of the prior union activity there is nothing in the record to establish that there was any animus that was in any way casually connected to his union activity. Rather, the evidence established that Ponce was disciplined not for his union activity and/or participation in Board processes but because he made comments that were found to be offensive and violative of the employer’s policies that he himself admits he made. Chaykho explained why he legitimately felt bothered by the comments. He stated,

What bothers me about the whole thing was I've been in a similar situation in the past, you know what I mean, when people make certain comments and I take, I'm sorry, I think it's stupid, referring to me or my people that we kill gay people, you know what I mean. What I worry about somebody around that's gay or have a child that's gay, how are they going to look at me, you know what I mean? Like they might hold a grudge against me or something

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<sup>2</sup> The prior Board proceedings Cases 28–CA–63215, 28–CA–166351 and 28–CA–168680 took place in 2016.

<sup>3</sup> I am not persuaded by the argument; and, the facts do not support the conclusion that Respondent had been lying in wait since 2016, to retaliate against Ponce by issuing him a mere warning. In *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983), a case arising under Title VII, the court held that, “where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.” Similar reasoning is applicable in this case.

like that. That's why I didn't like the way he said it or what he said. (Tr. 135.)

I also find that there is insufficient evidence to establish that Respondent's asserted reasons for issuing the letter of warning were pretextual and/or were in any way motivated by Charging Party's union activity or prior participation in Board processes.

## 2. The alleged impression of surveillance

In 2019, Respondent installed the Samsara system in its fleet of delivery trucks. The system is an advanced system for vehicles which provides real time analytics, WIFI, and cameras on with a view of the street and one with a view of the cab. (Tr. 246.) The cameras have no communication capabilities and do not have any built-in microphones. (Tr. 246.) The cameras serve various functions including protecting the public from unsafe driving as well as protecting drivers from liability when they are not at fault. The Company does not routinely view the camera footage, but it is accessible if there is an accident. The system can alert if a driver is in an unauthorized residential area, the driver has stopped for an extended period or a harsh braking event has occurred. (Tr. 259, 263, 264). The company has a provision within its Driver's Manual that requires all vehicle safety systems must always remain on unless the driver is specifically authorized to turn them off. (R. Exh. 8).

Jose Ruiz was a driver who has been working for the Company for a period of 9 years. On July 13, 2021, while eating lunch Ruiz covered the camera in his truck cab. He did this because he viewed his lunch as his own time and wanted to insure his privacy. (Tr. 105.) At 12:06 his supervisor, Barr, sent him a text message that stated, "got the uniform guy for sizing bud, and you cant (sic) cover the camera its (sic) against company rules." (GC Exh. 18.) After being told to uncover the camera Ruiz has since complied at all times and kept the camera uncovered. (Tr. 105–106.)

Creating an impression that a company keeps its employees' union activities under surveillance violates Section 8(a)(1) because it could inhibit the employees' right to pursue union activities untrammelled by fear of possible employer retaliation. *NLRB v. Ralph Printing & Lithographing Co.*, 379 F.2d 687, 691 (8th Cir. 1967). An employer unlawfully creates the impression of surveillance by statements or other conduct which, under all relevant circumstances, would lead reasonable employees to assume that their union activities have been placed under surveillance. See generally *Metro One Loss Prevention Services*, 356 NLRB 89, 102 (2010). It is not a violation of the Act for an employer to merely observe open union activity, so long as its representatives do not engage in behavior that is "out of the ordinary," *Partylite Worldwide, Inc.*, 344 NLRB 1342 (2005); *Arrow Automotive Industries*, 258 NLRB 860 (1981), *enfd.* 679 F.2d 875 (4th Cir. 1982).

I find that there is insufficient evidence in the record to conclude that Respondent created an unlawful impression of surveillance. In the first instance there is nothing in the record to indicate that the request to uncover the cab camera was "out of the ordinary" given the existence of the cameras and the longstanding company policies relating to such. Secondly, there is no indication that Ruiz was engaged in any union activity in the cab of his truck, nor that Barr was aware of any union activity of Ruiz in or out of the cab of his truck. (Tr. 111, 265.) Lastly there

is nothing to suggest that the cameras were anything other than “mere observation” of activity of the changing workplace of a driver. See *F. W. Woolworth*, 310 NLRB 1197 (1993) (employer’s “mere observation” did not violate the Act). Accordingly, I find that Barr’s request to Ruiz to uncover his camera did not create an unlawful impression of surveillance and did not violate Section 8(a) (1) of the Act.

### CONCLUSIONS OF LAW

1. Respondent’s actions of issuing a letter of warning to Uvaldo Ponce did not violate Section 8(a)(3), (4) and (1) of the Act.
2. Respondent’s request that employee Ruiz to uncover the camera in the cab of his truck did not violate Section 8(a)(1).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

### Order

The complaint is dismissed.

Dated, Washington, D.C. June 22, 2022



**Dickie Montemayor**  
**Administrative Law Judge**

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<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.